HOY PAK KWAI

v.

LEONG KON FAH & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT JC
[ORIGINATING PETITION NO: S26-01-2000]
8 NOVEMBER 2004

COMPANY LAW: *Winding-up - Petition - Application for - Allegations of oppressive conduct by petitioner against 1st and 2nd respondents - Whether substantiated - Whether there was a breach of fiduciary duty by 1st and 2nd respondents - Whether petition to be granted - Companies Act 1965, s. 181*

This was a petition by the petitioner pursuant to s. 181 of the Companies Act 1965 ('the Act') seeking numerous reliefs and the ultimate relief of an order for the winding-up of one Aerial Product Industries Sdn Bhd ('the company'). The petitioner held shares representing 40% of the equity in the company while the 1st and 2nd respondents were the other directors of the company. The petitioner's case was founded on various complaints against the 1st and 2nd respondents consisting of acts representing a combination of matters under both ss. 181 and 218 of the Act. The main issue requiring consideration was whether the complaints advanced by the petitioner came within the ambit of s. 181 of the Act, and if so, whether a case had been made out under the said section.

Held (dismissing the petition):

[1] On the facts, the petitioner's complaints, be it the 1st and 2nd respondents' alleged conflict of interest in relation to the company, an irregular payment of RM400,000 by a company solely owned by the 1st respondent, the slow recovery of a debt from a company in which the majority shareholders were the 1st and 2nd respondents, a reduction in the prices of the company's products to benefit the 1st and 2nd respondents or the abuse of voting powers by the 1st and 2nd respondents, were unsubstantiated, unfounded and did not, in any way, amount to oppressive conduct towards the petitioner. (pp 185 f-h, 186 a-h & 187 a-h)

[2] It was also rather unnecessary to deal at length with the extensive submissions on matters relating to alleged breaches of fiduciary duty by the 1st and 2nd respondents because they were not of any relevance, since the 1st and 2nd respondents were not only directors but shareholders of the company with a combined shareholding of 60% that gave them the majority vote. In those circumstances, the 1st and 2nd respondents did not owe any duty to the petitioner as to how they exercised their votes. (p 188 g-h)

[3] On the facts of the present case, the conduct and petulance of the petitioner was of no assistance to his claim for the company to be wound-up because in order to succeed, he had to come with clean hands. Furthermore, the company, as shown by its audited accounts, was in a robust and healthy state. (pp 189 a-b & 190 a)

[4] Having considered the relevant factors and circumstances of this case, the petitioner had failed to establish a case under s. 181 of the Act. (p 190 f)

Case(s) referred to:

Beh Chun Chuan v. Paloh Medical Centre Sdn Bhd & Ors [1999] 7 CLJ 1 HC ***(foll)***

Dato' Toh Kian Chuan v. Swee Construction And Transport Company (Malaya) Sdn Bhd [1996] 1 MLJ 730 ***(foll)***

Lai Kim Loi v. Datuk Lai Fook Kim & Anor [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC ***(dist)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 2 MLJ 227 ***(foll)***

Re Tong Eng Sdn Bhd (Loh Loon Keng, petitioner)]1994] 1 MLJ 451 ***(foll)***

Tan Kian Hua v. Colour Image Scan Sdn Bhd & Ors [2004] 6 CLJ 174 HC

Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1997] 1 CLJ 463 CA ***(foll)***

Yai Yen Hon v. Lim Mong Sam [1997] 2 CLJ 812 CA ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 181, 218

Other source(s) referred to:

Walter Woon, *Company Law,* 1988, p 126

For the petitioner - Francis Wong; M/s Peter Lo & Co

For the 1st & 3rd respondents - Jeyan Marimuttu; M/s J Marimuttu & Partners

For the 2nd respondent - Gabriel Ho; M/s Gabriel Ho & Co

Reported by Suresh Nathan

JUDGMENT

Linton Albert JC:

This is a petition under s. 181 of the Companies Act 1965 (the Act). The reliefs sought are numerous as they are disparate and relate to acts covering a span of several years. The petitioner also seeks the ultimate relief of an order for the winding-up of Aerial Product Industries Sdn Bhd, the 3rd respondent (the company) although the petitioner purports also to bring this action for the benefit of the company. I shall begin by setting out the relevant facts.

The petitioner is 40 years old, holding 600,000 shares representing 40% of the equity in the company of which he and his father, one Ho Egg Sun (Ho) are alternate directors. The other directors are the 1st and the 2nd respondents whose association with Ho goes as far back as 1979 when all three of them were directors in one Perusahaan Kejuruteraan Am Sdn Bhd (AM). The petitioner was then 15 years old. AM was in the business of selling industrial gases imported from Singapore. Subsequently, they came up with the idea of manufacturing the industrial gases and oxygen themselves and in June 1987 incorporated the company for that purpose. The company's factory was jointly set up by the three of them in the time-honoured Chinese business tradition of trust and mutual benefit and voluntary contribution for the well-being of the company which typified their relationship and the conduct of the affairs of the company. Hence, the task of obtaining the requisite licences and permits for the factory and manufacturing plant was given to the 1st respondent whose firm, one Malaysia Workshop, was also entrusted with the construction of the plant and factory buildings while Ho was tasked with acquiring the machinery for the plant from China and supplied the building materials for the factory. The 2nd respondent's contribution at the inception was the supervision of the installation of the plant and machineries right through to the commissioning of the plant. The 2nd respondent continued to be responsible for the running, operation and maintenance of the plant and the production of acetylene gas and oxygen and training for the workers. In the early years, the petitioner was not involved in the affairs of the company as he was perhaps still too young then, but his father Ho was a contemporary of the 1st and 2nd respondents.

So much for the background of this petition and I shall now turn to consider whether the petitioner has established his case. Although the petitioner began to take an active interest in the affairs of the company from 1998, replacing his father Ho, he knew that the original founders of the company had agreed amongst themselves that they would respectively continue dealing with the company through other business enterprises in which they had interests. Thus, when the company started producing acetylene and oxygen for industrial use,

the company appointed then companies in which each of the original founders had shares, as dealers for the company's products, for example Malaysia Workshop, Palucky Sdn Bhd and AM. The company was managed informally without the need to have minutes of meeting of the directors because both Ho and the 2nd respondent did not know English and meetings of the directors were held at the office of Malaysia Workshop of which the 1st respondent was the sole proprietor or even at coffee shops.

Learned counsel for the petitioner, Mr. Francis Wong has founded the case on a pot-pourri of complaints against the 1st and 2nd respondents consisting of acts representing a combination of matters under both s. 181 and 218 of the Act. Mr. Jeyan Marimuttu, counsel for the 1st and 3rd respondents and Mr. Gabriel Ho, counsel for the 2nd respondents have taken strong exception to this and have devoted a substantial part of their respective written submissions suggesting that the petitioner's approach is fatally flawed. I am not, however, persuaded to agree with them because in the circumstances of this case, none of the authorities brought to my attention support the view taken by them. For example, in *Lai Kim Loi v. Datuk Lai Fook Kim & Anor* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 the title of the petition was stated to be under s. 218 of the Act but the order for winding up was prayed for under both ss. 181 or 218 of the Act thus making it a hybrid petition. Added to that was the fact that there was also a pending suit where the issues and relief sought duplicated those in the petition which amounted to a multiplicity of actions. The learned judge in that case held that the petition was frivolous and vexatious and an abuse of the process of the court and accordingly dismissed the petition. On appeal, the Supreme Court, having considered all the circumstances of the case came to the same conclusion and decided that the learned judge had exercised his discretion correctly in striking out the petition. Clearly, the petition here does not suffer the same infirmities as those established in *Lai Kim Loi v. Lai Fook Kim & Anor*. I shall now proceed to determine whether the complaints advanced by the petitioner come within the ambit of s. 181 of the Act and if so, whether a case has been made out under the section. I begin by reproducing excerpts from the judgment of Lord WiIberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri Sdn Bhd & Ors v. Ling Beng Sung* [1978] 2 MLJ 227 which set out the relevant law and principles which ought to be applied here:

> Section 181(1) and (2) of the Malaysian Companies Act, 1965, are as follows:
>
> (1) Any member or holder of a debenture of a company or in the case of a declared company under Part IX, the Minister, may apply to the court for an order under this section on the ground:

(a) That the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) That some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the court is of the opinion that either of such grounds is established the court may, with the view to bringing to an end or remedying the matters complained of make such order as it thinks fit and without prejudice to the generality of the foregoing the Order may:

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital;

or

(e) provide that the company be wound up

This section can trace its descent from section 210 of the United Kingdom Companies Act, 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider section 186 of the Australian Companies Act, 1951. But section 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-section (1)(a) it adds disregard of the interests of members, etc. to oppression as a ground for relief in this respect making explicit what was already inherent in the section (see *In re H.R. Harmer Ltd*). It introduces a new ground in sub-section (1)(b) and, most importantly, in sub-section (2), which sets out the kinds of relief which may granted, it provides for "remedying the matters complained of" and states as a specific type of relief that of winding-up of the company." ...

a Secondly, for the case to be brought within section 181(1)(a) at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. b It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made *(Elder v. Elder & Watson Ltd)*: their Lordships would place the c emphasis on "visible". And similarly "disregard" involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v. Drysdale*). Neither "oppression" nor "disregard" need be shown by a use of d the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

Their Lordships agree that the wording of the section (and the same is true of section 181(1)(a) relates to a present state of affairs: "are being conducted", e powers "are being exercised" are grammatically clear: the language may be contrasted with that in section 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-section (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may he held to be "oppressive" or "in f disregard" even though a particular objectionable act may have been remedied." ...

The remuneration of the Directors and of the Managing Director, which had been regularly voted and approved by the shareholders, was a matter for them and no case was made for interfering with their decision.

g I also adopt the views expressed by the learned author Walter Woon in *Company Law* (1988) at p. 126 which was cited with approval in the judgment of Selventhiranathan, JC (as he then was) in *Re Tong Eng Sdn Bhd (Loh Loon Keng, Petitioner)* [1994] 1 MLJ 451 at p. 457:

h Section 216 (of the Companies Act of Singapore which is in *pari materia* with s. 181 of the Act) embodies a member's personal right to be treated fairly. As such, the rule in *Foss v. Harbottle* does not restrict a member's ability to petition for relief. Section 216 belongs in the class of members' personal rights and therefore properly falls outside the scope of the proper plaintiff rule. i However, it must be clear that the member is indeed seeking relief in respect

of an injury done to himself. Where what is complained of is in fact an injury to the company and not to the petitioning member, the proper plaintiff is the company itself. It should be borne in mind that an injury to the company is not *ipso facto* an injury to the members: *Prudential Assurance Co. Ltd v. Newman Industries Ltd (No. 2)* [1982] 1 All ER 354. (emphasis added).

At p 121 of the same textbook, Walter Woon has this to say: Mismanagement of the company does not necessarily constitute oppression or disregard of a member's interest: *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242. Nor, indeed, does the fact that a member is consistently outvoted mean that he is oppressed or that his interests are being disregarded. It should be remembered that the majority also has rights. Section 216 does not give jurisdiction to the court to interfere with the internal management of companies which are being managed honestly and in accordance with the law *Re Bright Pine Mills Pty Ltd* [1969] VR 1002.

The acts complained of must affect the member in his capacity as a member. This is apparent from the wording of the section itself: *Re HR Harmer Ltd* [1958] 3 All ER 689. If the acts in question affect the complainant in some capacity other than as member, he has no right to complain under s. 216. For example, a director may feel that the other directors are unfairly excluding him from the management of the company. Even if he is a member of the company, this does not come within the ambit of s. 216 since then he is oppressed in his capacity as director, not as member. However, if a person is oppressed in his capacity as member he may get relief in respect of acts that affect him in some other capacity as well.

I turn now to apply these principles to the facts as proved and for the sake of completeness I shall deal with them in the order the complaints are narrated and set out in the petition. The first complaint revolves around Acoxgas Sdn Bhd where both the 1st and 2nd respondents feature prominently as directors, and shareholders. Acoxgas Sdn Bhd is also a manufacturer of industrial gas and oxygen and is in direct competition with the company. The petitioner has enumerated a host of acts and deeds attributed to the 1st and 2nd respondents constituting conflicts of interest. I do not consider it necessary to subject them to critical scrutiny as these complaints relate to injury to the company, not to the petitioner as a member of the company, which is clearly outside the purview of s. 181 of the Act. It is incomprehensible how the petitioner can be heard to complain about the 1st and 2nd respondents in relation to Acoxgas Sdn Bhd when the petitioner has, together with his brother-in-law, one Ho Toh Chee, the company's auditor, incorporated Tawau Oksigen Plant Sdn Bhd way back in 1989 to also manufacture industrial gas and oxygen in direct competition with the company and it does not matter that Tawau Oxygen Plant Sdn Bhd has never been operational because what is sauce for the goose is

also sauce for the gander. It must also be remembered:that from its early days the founding members including the petitioner, each has, in one way or another, through different business entities, been in situations of conflict of interest in relation to the company.

The second complaint relates to Malaysia Workshop, a firm solely owned by the 1st respondent and carrrying on business in engine repair, steel fabrication and welding, civil and structural work, general contract work, manufacturing works and supply. The petitioner begrudges the fact that the 1st respondent has been obtaining from the company a free supply of industrial gas which is of no commercial value to the company and otherwise released to the atmosphere, an attitude aptly characterized by learned counsel for the 1st and 2nd respondents as that of a dog in the manger. There is also allegation of an irregular payment of RM400,000 claimed by and paid to Malaysia Workshop by the company. In my judgment this does not amount to conduct oppressive of the petitioner because there is nothing sinister about this payment. The cheque for the payment was sent to the petitioner the particulars of which were also given to him by one Miss Chong upon his request and more importantly, the company's auditor did not make any adverse finding in relation to the payment. In short, the petitioner's allegation is unfounded.

The third complaint concerns the company's trade debtors one of whom was Palucky Sdn Bhd a company in which the petitioner has substantial interest but the petitioner singles out one Industri Teknik Kita Sdn Bhd because the amount it owed to the company in 1998 was in excess of one million ringgit and the majority shareholders were the 1st and 2nd respondents. The complaint is that the 1st and 2nd respondents were slow to recover the debt from Industri Teknik Kita Sdn Bhd and steps were only taken to do so after much prompting from the petitioner. The debt was eventually recovered in full but how that could have constituted oppression is beyond me although in fairness to the petitioner, his concern for the potential injury to the company by reason of the enormous debt ought to be lauded.

The fourth complaint relates to the price war which ensued after the company at the behest of the 1st and 2nd respondents and in disregard of the petitioner's opposition, reduced the price of its products. The petitioner contends that the reduction in the prices of the company's products was designed to benefit the 1st and 2nd respondents as directors and shareholders of Acoxgas because it thereby enabled Acoxgas Sdn Bhd to capture a bigger market. How this is so, defies logic, because conceivably it would have been more difficult for Acoxgas Sdn Bhd being a recent player to penetrate the market if prices offered by long-established manufacturers like the company were low as it

would have deprived Acoxgas the opportunity to sell its products by undercutting the established manufacturers. I find it rather inscrutable that the company suffered loss as a result of the reduction in prices and in any event, this contention by the petitioner is unsupported by evidence.

The fifth complaint comprises instances where the 1st and 2nd respondents who between them hold 60% of the shares in the company, are alleged to have abused their voting powers, namely:

1. approval of personal insurance taken out in favour of each of them;
2. regularizing minutes the contents which favour them;
3. remuneration of RM8,000 per month for the 1st respondent;
4. approving dealer price for the company's products to Malaysia Workshop;
5. according themselves power to reduce prices for the company's products;
6. increase of rental payment to Malaysia Workshop;
7. payment of rental to Teknik Kita Sdn Bhd for dumping of the company's industrial waste;
8. encashment of the company's fixed deposit account to pay RM400,000 to Malaysia Workshop;
9. not keeping record of the company's cylinders leaving the factory;
10. proposed repair works for the factory;
11. purchase of vehicle, a Toyota twin cab for use by the 1st respondent;
12. failure to enforce a guarantee by the guarantor of the debt owed by Syarikat Huat Guan Oxygen to the company and writing off the debt.

It is painfully apparent that the foregoing instances encompass matters ranging from those that can properly be described as trivial to matters that clearly relate to the management of the affairs of the company. Applying the principles set out in *Re Kong Thai Sawmill* and *Re Tong Eng Sdn Bhd (supra)*, I am of the view that those acts do not constitute oppression and further support for this can be found in the judgment of Mohd Ghazali, J (as he then was) in *Dato' Toh Kian Chuan v. Swee Construction And Transport Company (Malaya) Sdn Bhd* [1996] 1 MLJ 730 at p 748:

What is the scope of s. 181(1)? In the Law of Company Liquidation by J O'Donovan (3rd Ed), which was referred to in the submission of counsel for the respondent company, the learned author said (at pp. 141-142) that relief under s. 320 of the Australian companies Act (which is the equivalent of s. 181 of our Act) is available to any member of a company who complains that its affairs are being conducted in a manner which is oppressive to one or more of the members, including himself and that the second requirement is that it must be the affairs of the company itself which are conducted in an oppressive manner. The learned author then went on to say (at pp 143-144):

> It has frequently been stressed that s. 320 is not intended to provide minority shareholders with a means of stultifying the voting power of the majority: ...
>
> The mere use of voting power at board meeting or at a general meeting to secure the passing of resolutions which the other members of the board or shareholders oppose, would not in general constitute oppression for the purpose of the section or for any other purpose. For a petition to succeed it must be shown that there has been oppression in a real sense of members qua shareholders, and not merely a subordination of their wishes to the power of the voting majority (*Re Harmer Ltd* [1959] 1 WLR 62 at p 87 per Romer LJ.

And in *Beh Chun Chuan v. Paloh Medical Centre Sdn Bhd & Ors* [1999] 7 CLJ 1 at p. 8:

> If a director of a company were to draw a renumeration to which he was not legally entitled to or in excess of the renumeration to which he was legally entitled, this might no doubt found a misfeasance proceedings or proceedings for some other kind of relief, but it would not, in our judgment, of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting powers or retain the renumeration or to stifle proceedings by the company or other shareholders in relation to it.

I have, without any disrespect to learned counsel for the petitioner, considered it rather unnecessary to deal at length with the extensive submission on matters relating to alleged breaches of fiduciary duty by the 1st and 2nd respondents. This is because I do not think they are of any relevance in that the 1st and 2nd respondents are not only directors but shareholders of the company and their combined shareholding of 60% give them the majority voting power. In these circumstances, the 1st and 2nd respondents do not owe any duty to the petitioner as to how they exercise their votes. In *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393 Mahadev Shankar JCA at p 425 stated:

> ... the power to vote in general meeting is not a fiduciary power, and a shareholder owes no duty to anybody as to how he exercises his vote.

It is perhaps not inappropriate to make certain observations about the petitioner based on the established facts in the present case, not the least notable of which is the removal of the company's records and plant manual by stealth, using them to lodge a police report alleging indiscretions which turned out to be unfounded and causing some disruption to the company's operation by his failure to return the plant manual. The petitioner's petulance, to put it mildly, is of no assistance to his claim for the company to be wound up because in order to succeed he must come with clean hands. In *Tan Kian Hua v. Colour Image Scan Sdn Bhd & Ors* [2004] 6 CLJ 174 a recent authority brought to my attention by learned counsel for petitioner, Abdul Malik Ishak, J, stated at p. 184:

> It is a correct statement of the law to state that s. 181 of the Companies Act 1965 is related to a winding up under the "just and equitable" ground under s. 218(1)(i) of the Companies Act 1965. So the cases decided on the "just and equitable" ground for winding up a company are equally applicable in the context of s. 181 of the Companies Act 1965 *(Re Novabran Pty Ltd (No. 2)* [1986] 11 ACLR 279, 292; and *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application* [1994] 2 MLJ 789).

And in *Yai Yen Hon v. Lim Mong Sam* [1997] 2 CLJ 812 at pp. 828-829:

> It must be remembered that a petitioner who comes to court to wind up a company on the just and equitable rule must always come with clean hands. As Lord Cross of Chelsea said in *Ebrahimi v. Westbourne Galleries Ltd* [1972] 1 All ER 492 at p 507:
>
> A petitioner who relies on the just and equitable clause must come to court with clean hands.
>
> In the present case, we have borne in mind that it would be very drastic to wind up the company. All the other shareholders did not want to wind up the company. There were no creditors supporting the petition. The company is a very profitable and successful going concern. There were no allegations of mismanagement or misuse of the company's funds. For the year ended 31 October 1990, it is not in dispute that the company made a huge profit of RM2,884,005, and the respondent himself signed the accounts. The company also paid good dividends in 1991 and the respondent received director's fee of RM20,000 per year each in 1991 and 1992.

These factors led the Court of Appeal to refuse to wind up the company in that case.

The other observation that must be mentioned is the company's robust and healthy state as shown by its audited accounts which show as follows:

1. Bank balance:

1996	RM 1,030,739
1997	RM 1,413,206
1998	RM1,275,547
1999	RM 937,286
2000	RM 587,553
2001	RM 485,802
2002	RM 990,863
2003	RM1,616,415

2. Dividends:

1995	RM1,142,857.14
1996	RM1,000,000
1997	RM1,900,000
2002	RM1,620,948

Having considered the above factors and all the circumstances I find that the petitioner has failed to establish a case under s. 181 of the Act and I accordingly dismiss the petition with costs.